the Control of Rent Ordinance if there is evidence that he is no longer in physical possession of the premises and has no *animus revertendi*, even though the statutory tenant was not a party to the proceedings before the court and he relies on the case of *The Chartered Bank (Malaya) Trustee Ltd.* v. *Abu Bakar* [4] in support of this proposition.

In that case certain premises known as 104 North Bridge Road, Singapore, which were rent-controlled premises, were let by the plaintiff company on a monthly tenancy to the firm of Mohamed Saiboo & Co., which consisted of two partners Mohamed Salih and Abdul Majid. Various changes in the partnership took place and at the time the writ was issued the two partners were Abdul Majid and Abu Bakar, the defendant. Before the writ was issued a notice to quit was served on the original two partners Mohamed Salih and Abdul Majid requiring them to deliver up possession of the premises on the 28th February 1955. The plaintiff company in due course commenced proceedings against the defendant Abu Bakar and in their statement of claim asked for a declaration that "the defendant by his servants or agents or otherwise is not entitled to possession of the premises No. 104 North Bridge Road, Singapore". It was admitted by the defendant that by 1954 Mohamed Salih was no longer a partner of the firm and that in June 1954 Abdul Majid absconded to India owing the partnership and other creditors a considerable sum of money.

On these facts the majority of the Court of Appeal held that the plaintiff company was entitled to the declaration it sought on the ground that the defendant was not the licensee of Abdul Majid and that he could not be deemed to have held over after the determination of the contractual tenancy as Abdul Majid's partner, agent or licensee.

The facts of the present case are clearly different as the learned trial judge has found that the defendants were licensees of the association. In these circumstances, I am of the opinion that, as the association had not been made a party to the proceedings in the court below, the learned trial judge was right in refusing to make an order for possession against the defendants.

For the foregoing reasons I would dismiss the appeal with costs.

Wee Chong Jin C.J. and **Buttrose J.** concurred.

Appeal dismissed.

Solicitors: *Chung & Co.; Donaldson & Burkinshaw.*

SINNADORAI v. NEW ZEALAND INSURANCE CO. LTD.

[O.C.J. (Chang Min Tat J.) June 12, 1968]
[Ipoh — Civil Suit No. 178 of 1968]

Arbitration — Insurance policy providing for arbitration — Stay of proceedings — Arbitration Ordinance, 1950.

Insurance — Judgment obtained by passenger against insured — Liability of insurers to satisfy judgment — Two classes of third parties — Road Traffic Ordinance, 1958, ss. 75(1), 80 & 81(1) — Contracts (Malay States) Ordinance, 1950, s. 2.

A motor vehicle driven by one Idris bin Abdul Hamid (hereinafter called "the insured") was involved in an accident. The insured died. The plaintiff, who was a passenger in that vehicle, sustained injuries. She obtained judgment against the estate of the insured and sought to enforce that judgment against the defendants, who had issued a policy of insurance to the insured in respect of the user of his vehicle. Under the terms of the policy, the defendants undertook to cover the insured against claims by passengers, with the usual provision for arbitration. The defendants applied for a stay of proceedings under the Arbitration Ordinance 1950.

Held: (1) having regard to section 81 of the Road Traffic Ordinance, 1958, the liability of insurers to satisfy a judgment obtained by a passenger against an insured does not arise until the insured, not being a company, becomes a bankrupt or has made a composition arrangement with his creditors. Neither of the latter events having occurred, the plaintiff does not have a cause of action against the defendants.

(2) the arbitration clause in the insurance policy could not be invoked until the insured had been made a bankrupt. Therefore the defendants' application for a stay of proceedings failed.

Cases referred to:—

(1) *Krishna Lal Sadhu & Anor.* v. *Mt. Promila Bala Dasi*, A.I.R. 1928 Cal. 518, 522.

(2) *Smith* v. *Pearl Assurance Co. Ltd.* [1939] 1 All E.R. 95.

(3) *Digby* v. *General Accident, Fire and Life Assurance Corporation Ltd.* [1940] 2 K.B. 226.

CIVIL SUIT.

N. Sharma for the plaintiff.

P. P. Dharmananda for the defendants.

Cur. Adv. Vult.

Chang Min Tat J.: This is an application by the defendants to the action for a stay of proceedings under the provisions of the Arbitration Ordinance 1950.

The circumstances leading to the application are as follows: The plaintiff was at the relevant time a passenger in a motor vehicle driven by one Idris bin Abdul Hamid (hereinafter referred to as "the insured") when the vehicle became involved in an accident and she sustained injuries and suffered damages. The insured died at the accident. Arising therefrom, the plaintiff obtained judgment against the estate of the insured for $8,500 and costs. The costs have not been taxed. There is however a "bullock order"

in respect of such costs. The plaintiff now seeks to enforce the judgment against the defendants who had issued a policy of insurance to the insured in respect of his user of his vehicle. Under the terms of the policy of insurance, the defendants have undertaken to cover the insured against claims by passengers, with the usual provision for arbitration.

It is of course elementary that passenger liability in the case of a private car is not on the same footing as liability to third parties who are other than passengers. Section 75(1) of the Road Traffic Ordinance, 1958 clearly distinguishes between the two classes of third parties. It makes it compulsory for insurance cover against claims by third parties other than parties who except in the case of a motor vehicle in which passengers are being carried for hire or reward, are being carried in the car. For convenience, I shall hereafter refer to the two classes as statutory third parties and passengers.

In the case of statutory third party liability, the law as enacted in section 80 of the Road Traffic Ordinance establishes the duty of the insurers to satisfy judgments obtained by statutory third parties. And it is conceded that in a claim by a statutory third party, the liability of the insurers arises notwithstanding the terms of the policy of insurance, unless they can come under any of the provisions of sub-sections (2) and (3) of section 80, and no question of arbitration arises.

Passenger liability is, as I have said, of another nature. The liability of the insurers to satisfy the judgment obtained by a passenger does not, in my view, having regard to the provisions of section 81 of the Road Traffic Ordinance arise until the happening of one of the events enumerated therein. Section 81(1) of the Road Traffic Ordinance reads as follows:—

"Where under any policy issued for the purpose of this part of this Ordinance a person (hereinafter called "the insured") is insured against liabilities to third parties which he may incur then:—

(a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or

(b) in the case of the insured being a company in the event of a winding-up order being made or a resolution for a voluntary winding-up being passed with respect to the company or of a receiver or manager of the company's business or undertaking being duly appointed or of possession being taken by or on behalf of the holders of any debentures secured by a floating charge on any property comprised in or subject to the charge;

if either before or after that event any such liability as aforesaid is incurred by the insured his rights against the insurer under the policy in respect of the liability shall, notwithstanding anything in any written law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred."

On a proper construction, the right of a passenger armed with a judgment against the insured can be exercised against the insurers only when the insured, not being a company, becomes a bankrupt or has made a composition or arrangement with his creditors.

In my view, section 81(1) of the Road Traffic Ordinance which is taken from Third Parties (Rights against Insurers) Act 1930 (20 & 21 Geo. 5 Ch. 25) was specifically enacted to enable an injured passenger, being a stranger to the contract between the insured and the insurer, to sue on the policy by providing that in the happening of certain events, the insured's right against the insurer for indemnity or discharge of liability is transferred to and vests in the passenger to whom the liability was incurred, since even under the extended definition of "consideration" in section 2 of the Contracts (Malay States) Ordinance 1950 it has been said: "Not only, however, is there nothing in section 2 to encourage the idea that contracts can be enforced by a person who is not a party to the contract, but this notion is rigidly excluded by the definition of "promisor" and "promisee"." (See Rankin C.J. in *Krishna Lal Sadhu & Anor.* v. *Mt. Promila Bala Dasi* [1]).

It seems to me therefore that before the passenger can sue on the insured's policy of insurance, she has to take bankruptcy proceedings against the insured and that until she has done this, she has no rights under the policy, being a stranger to the contract. When she has taken such proceedings and an adjudicating order has been made, then she becomes vested by statute with the rights of the insolvent insured. In such an event, the contractual provision for arbitration can be invoked. (See *Smith* v. *Pearl Assurance Co. Ltd.*[2] and *Digby* v. *General Accident, Fire and Life Assurance Corporation, Limited.*[3] It follows that the arbitration clause cannot be invoked until the insured has been made a bankrupt.

I am conscious that counsel for the insurers has not submitted that the plaintiff-passenger has no cause of action against the insurers since the estate of the deceased insured has not been proved to be insolvent. It may be argued that in applying merely for a stay under the arbitration clause he has impliedly admitted the liability of the insurer to the passenger under the policy of insurance, but it does not seem to me that even if this argument is valid, his willingness to submit to arbitration creates an estoppel against any subsequent objection to the action as taken. Having regard to the rule that there can be no cause of action not known to law, it seems to me that in this case the principle *"generalia specialibus non derogant"* is of relevant application.

In the view of the law I have taken, the defendants' application must be dismissed with costs.

Application dismissed.

Solicitors: *N. Sharma; Dharmananda & Co.*

LEONG YOONG v. LEE SEM YOONG

[F.C. (Barakbah L.P., Suffian & MacIntyre F.JJ.) June 13, 1968]

[K.L. — Civil Appeal No. X41 of 1967]

Landlord and Tenant — Burden of proof that premises was built after January 31, 1948 — Meaning of 'premises' — Licensee — Termination of licence — Trespass — Damages — Control of Rent Ordinance, 1956, s. 2(1).

Evidence — Burden of proof — Landlord and Tenant — Onus on landlord to prove that premises was built after relevant date — Control of Rent Ordinance, 1956, s. 2(1).

Evidence — Res Judicata — Matter not in issue in earlier proceedings.

Damages — Trespass to land — Special damages — Actual damage — Full compensation — Special damages and mitigation to be specifically pleaded — Foreseeability.

The respondent was the executor and trustee of the estate of his deceased father. In 1957, the respondent's father purchased land on which stood a certain premises. The appellant was in occupation of the premises. On July 1, 1963, the respondent entered into an agreement to sell the land. The appellant's refusal to vacate the premises prevented him from completing the sale. By a notice to quit dated May 15, 1963, the respondent determined the licence of the appellant to occupy the premises. On the expiry of the notice to quit, the respondent brought an action against the appellant in the sessions court for the recovery of vacant possession of the premises. The action was dismissed on a technical ground.

A second notice to quit dated July 24, 1964 was served on the appellant. On the expiry of the notice, the respondent instituted proceedings against the appellant for the recovery of vacant possession of the premises, and for damages for pecuniary loss suffered as a result of the appellant's wrongful occupation of the premises as a trespasser.

The appellant raised two defences — First, he denied that he was a licensee and contended that he was the lawful tenant of the premises. Secondly, he submitted that as the president of the sessions court had said in the judgment in the earlier proceedings that the appellant had occupied the premises since the Japanese Occupation, the issue was *res judicata*, and it was not open for the respondent to prove that the premises were not controlled premises by virtue of their erection after the relevant date.

Both defences were rejected by the trial court (see [1967] 2 M.L.J. 86). The learned trial judge ordered the recovery of vacant possession of the premises. He further awarded $45,800 as special damages for the loss of use of the purchase money and for assessments paid by the respondent until the completion of the sale. In an appeal from this judgment,

Held, dismissing the appeal: (1) bearing in mind that the burden of proving the tenancy was on the appellant, and the fact that the learned trial judge, after having had the advantage of seeing and hearing the witnesses, came to the conclusion that the appellant occupied the premises as a licensee, the finding of fact by the trial court should not be disturbed;

(2) the question of whether the premises existed during the Japanese Occupation was not *res judicata* as it was not in issue in the earlier proceedings before the sessions court;

(3) the order for recovery of vacant possession of the premises was affirmed, but the award of special damages to the respondent was reduced to $26,100, and continuing damages to $900 per mensem.

Per MacIntyre F.J.: ". . . . in an action by a landlord against a tenant in which the tenant claims the protection of the Ordinance, and the question whether the building existed before the relevant date becomes relevant, the onus, in the first instance, would be upon the tenant to show that he is a tenant of a premises as defined in the Ordinance. He would then be entitled to relief unless it is shown that the premises fell within any one of the provisos to the general definition of 'premises'. Therefore, the onus of proof that the premises were not subject to the Ordinance by virtue of proviso (a) to the definition of premises would lie upon the landlord."

Cases referred to:—

(1) *Powell* v. *Streatham Manor Nursing Home* [1935] All E.R. Rep. 58.

(2) *Watt or Thomas* v. *Thomas* [1947] A.C. 484.

(3) *Mohamed bin Myddin* v. *Teo Mek Yok* [1966] 2 M.L.J. 284, F.C.

(4) *Dadhi Ral Yado* v. *Mukat Rai* [1958] M.L.J. 193.

(5) *Annamalai Chettiar* v. *Yeoh Kee Tin* [1957] M.L.J. 9.

(6) *A. V. Vandayar & Ors.* v. *Sivagami Achi & Anor.*, A.I.R. 1949 P.C. 319.

FEDERAL COURT.

V. K. Palasuntharam for the appellant.

L. Kandan and *Kok Wee Kiat* for the respondent.

Cur. Adv. Vult.

MacIntyre F.J.: This is an appeal against the judgment of Gill J. in Kuala Lumpur High Court Civil Suit No. 1189 of 1964 ordering the appellant herein:—

(a) to deliver vacant possession to the respondent of premises No. 15-A Perkins Road on or before April 30, 1967;

(b) to pay damages in the sum of $45,800 for pecuniary loss suffered by the respondent as the result of the appellant's wrongful occupation of the premises as a trespasser;

(c) to pay continuing damages at the rate of $1,100 per mensem from May 1, 1967 until delivery of possession; and

(d) costs of the action.

In this action, the respondent sues as the executor and trustee of the estate of his late father, Lee Lip Sang alias Lee Lit Seng (hereinafter referred to as the deceased). The action is for recovery of possession of the aforesaid premises on the footing that the appellant is a